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No. 88-1472

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, Jay Brian Fuller,
Petitioner,

v.

UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should disturb a ruling of a Louisiana appellate court, which properly construed and applied Louisiana law to the facts before it in the record, using a standard of appellate review of facts mandated by the Louisiana Constitution, practice, and procedure for well over one hundred years, and further, one which has been uniformly upheld by this Court and the Louisiana Supreme Court as consistent with the federal Constitution.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The following is a list of parent companies, subsidiaries and affiliates of respondent United States Aircraft Insurance Group:

United States Aviation Underwriters, Inc.

General Reinsurance Company

The Aetna Casualty & Surety Company

Aetna Insurance Company

Continental Casualty Company

Employers Insurance of Wausau A Mutual Company

Hartford Fire Insurance Company

Liberty Mutual Insurance Company

Maryland Casualty Company

Reliance Insurance Company

Royal Indemnity Company

St. Paul Fire & Marine Insurance Company

The Travelers Indemnity Company

United States Fidelity & Guaranty Company

Zurich Insurance Company

State Farm Fire & Casualty Company

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The respondent, United States Aircraft Insurance Group, respectfully prays that this Court deny the petition for writ of certiorari, seeking review of the Louisiana Court of Appeal, Second Circuit's opinion in this case. That opinion is reported at 520 So. 2d 1282, and is reprinted in Petitioner's Appendix at 3a-26a.

Denial of the Petition for a Writ of Certiorari by the Louisiana Supreme Court, reprinted in Petitioner's Appendix at 2a, is now reported at 534 So.2d 444-45.

STATUTES INVOLVED

In addition to the provisions from the treaties, constitutions and statutes of the United States and the State

of Louisiana set forth in Petitioner's Appendix, the following provisions have been printed in Respondent's Appendix:

Constitutions of the State of Louisiana (App. at 2a, *infra*):

Constitution of 1812, Art. IV, Sec. 11; Art. VI, Sec. 11.

Constitution of 1845, Art. 63.

Constitution of 1852, Title V, Art. 62.

Constitution of 1864, Title V, Art. 70.

Constitution of 1868, Title IV, Art. 74.

Constitution of 1879, Art. 81.

Constitution of 1898, Art. 85; Art. 98 (as amended by Acts 1906, No. 137, adopted November 6, 1906).

Constitution of 1913, Art. 85; Art. 98.

Constitution of 1921, Sec. 10; Sec. 29.

Constitution of 1974, Sec. 5; Sec. 10.

Louisiana Civil Code (App. at 7a *infra*)

Article 2164

Constitution of the United States, Art. II, § 2 (App. at 5a *infra*)

STATEMENT OF THE CASE

This tort action for wrongful death was initiated by petitioner Deborah Hanson Fuller, individually and on behalf of her minor offspring in the First Judicial District Court for the Parish of Caddo, State of Louisiana. The decedent, Doug Fuller, was a passenger in a plane owned by Blanco Oil Company, when it crashed on May 28, 1981.

Petitioner chose not to request a trial by jury in the complaint. Instead, respondent United States Aircraft Insurance Group ("USAIG") asked for a jury trial in its answer, and paid the statutory costs associated therewith, pursuant to state law.

Prior to trial, all but two of the defendants settled with petitioner, leaving only Blanco Oil Company's primary insurer, respondent USAIG and its umbrella insurer, Chicago Insurance Company. At trial, the most critical issue involved the decedent's status as an independent contractor or employee of Blanco Oil Company. If the latter, then petitioner's exclusive remedy lay under the Louisiana Workers Compensation statute for which USAIG concededly was not liable under its policy.

Both petitioner and respondent submitted proposed jury charges on this issue, detailing the numerous factors comprising this evaluation under state law and the manner in which the evidence must be weighed with respect to each. The trial court accepted neither proposed charge, but formulated and gave its own instruction on this matter. The jury rendered a verdict in favor of petitioner and assessed damages in excess of $1,000,000, casting 57% of the fault to respondent's insured.

Respondent USAIG appealed the jury's verdict to the Louisiana Court of Appeal for the Second Circuit. Among the errors assigned were the following:

(1) Was the jury clearly wrong in finding that Mr. Fuller was an independent contractor for, rather than an employee of, White or Blanco?

(2) Was the trial court's jury charge as to distinguishing between an independent contractor and an employee unclear?

Petitioner's App. at 4a.

Concluding that these assignments of error were meritorious, the appellate court reversed the jury's verdict and rendered judgment in favor of respondent. *Id.* at 5a.

Regarding the challenged jury instruction, the appellate court concluded that:

> the manner in which the factors are stated creates considerable confusion as to the proper assessment

> of the evidence. Some of them apply directly; some of them do not conform to the general provisions; and some squarely lead to the wrong conclusion. In this state of affairs, we could not reasonably hold the instructions "adequate" on this most crucial aspect of the case.

Id. at 13a.

Turning its attention to the evidence in the record before it, the appellate court examined that evidence under the legal standard mandated by Louisiana constitutional, statutory and jurisprudential law to determine whether the decedent was an employee or independent contractor. After a detailed and exhaustive review of the evidence, the court concluded that the jury's verdict was manifestly erroneous, or clearly wrong, and held that the evidence, *a fortiori*, preponderated in favor of respondent. In so holding, the court observed that all but one of the factors clearly supported a finding of employee status, indicating a relationship of "almost total economic dependence." *Id.* at 24a. Significantly, it went even further, finding as follows:

> Given the overwhelming nature of the evidence, even under the standard of manifest error, we would be constrained to hold the verdict plainly wrong. And given the inadequacy of the jury instructions, we conclude *a fortiori* that the evidence preponderated to show that Doug Fuller was an employee . . . .

Id. at 25a.

Petitioner sought a rehearing, contending for the first time that the appellate court's rendering of judgment in favor of respondent deprived petitioner of her right to a jury trial, even though the record is clear that petitioner neither wanted nor requested one in the first instance. Petitioner's application for rehearing was denied, as was the subsequent application for writ of certiorari with the Louisiana Supreme Court. This petition for a writ of certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT HAS CONSISTENTLY HELD THAT THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN CIVIL CASES HAS NO APPLICATION TO STATE COURT PROCEEDINGS

Petitioner asks this Court in the first of its two questions presented to reconsider a question which has long been laid to rest, that is, whether the United States Constitution guarantees to its citizens the Seventh Amendment trial by jury in state court civil proceedings, including the prohibition against review of facts found by that jury. This Court's answer to that question has been an unconditional and unqualified "No." Thus foreclosed from arguing that the federal Constitution guarantees Seventh Amendment rights, petitioner has constructed a clever variant of that argument: federal treaty and statutory law, not the federal Constitution, guarantees to petitioner the Seventh Amendment rights.

Respondent submits that, if the federal Constitution, the supreme law of this land, does not extend the reach of the Seventh Amendment to state court civil proceedings, then *a fortiori*, a federal treaty or statute, which requires only that a state adopt laws consistent with the federal Constitution, should not be construed to do so either.

It has long been settled by this Court that the United States Constitution was ordained and established by the people of the United States for their own federal government and not for the government of the individual states, each of which established its own constitution with such restrictions on state power as it deemed appropriate. Where particular terms of the Constitution are intended to restrict state government, Chief Justice John Marshall explained in *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) that "[t]he question of their application to States is not left to construction . . . [but] . . . is averred in positive words. *Id.* at

249. Enacted in 1791 against a backdrop of fear that federal power would be abused, the Amendments to the Constitution were designed to guard against unwanted encroachment of the federal, not state, government. *Id.* at 250. Based on the foregoing principles, Justice Marshall held that the Amendments to the Constitution, which contain no express indication that they are to apply to State governments, cannot in fact be so applied. *Id. Accord Twitchell v. The Commonwealth of Pennsylvania*, 74 U.S. (7 Wall.) 321 (1869); *Fox v. State of Ohio*, 46 U.S. (5 How.) 410 (1847) (Amendments not designed as limits upon state governments, but are exclusively restrictions upon federal power intended to prevent interference with rights of states and their citizens).

The Seventh Amendment proved no exception to the general rule that the Amendments have no application whatsoever to the states. This Court has held many times that that Amendment relates only to trials in the federal courts. *E.g. Bute v. People of the State of Illinois*, 333 U.S. 640, 657 (1947); *Edwards v. Elliot*, 88 U.S. (21 Wall.) 532 (1874). Insofar as the Seventh Amendment is concerned, the states "are left to regulate trials in their own courts in their own way", *Walker v. Sauvinet*, 92 U.S. 678, 679 (1876), including the right to modify or even abolish jury trials altogether. *Olesen v. Trust Company of Chicago*, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957); *Melancon v. McKeithen*, 345 F.Supp. 1025, 1043-44 (E.D.La. 1972), *aff'd*, 409 U.S. 943 and 1098 (1972). As this Court observed in *Bowman v. Lewis*, 101 U.S. 465, 466 (1880):

> [T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. . . . .
>
> Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by

> jury, and on the other no such right. Each State prescribes its own modes of judicial procedure.

Not even the subsequent enactment of the Fourteenth Amendment in 1868, which this Court has selectively construed to apply to State governments certain fundamental rights contained in other Amendments, effected any change in the law on the subject of jury trials in civil suits in state court. *Walker v. Sauvinet*, 92 U.S. 678 (1876). In *Walker*, this Court held that trial by jury in state courts is not a privilege or immunity of national citizenship which states are forbidden by the Fourteenth Amendment to abridge. *Compare Duncan v. Louisiana*, 391 U.S. 145 (1968) (in criminal cases, Sixth Amendment right to jury trial is constitutionally guaranteed in state courts).

Pursuant to its rightful authority, the State of Louisiana, drawing from both the civilian heritage which forms the foundation of its laws, and the English/American common law, created a judicial system of its own, incorporating trial by jury in civil cases (although the federal Constitution did not so require) and appellate review of fact and law. Contrary to petitioner's intimations, this judicial system has been entrenched in Louisiana from its inception as a State in 1812 through the long-established practice of its courts. *E.g. Abat v. Doliole*, 4 Mart. (O.S.) 316 (1816). Appellate review of facts was subsequently incorporated implicitly in Louisiana's constitutions and, beginning in 1879, expressly carried forward in those constitutions. H. McMahon, *The Louisiana Code of Civil Procedure*, 21 La. L. Rev. 1, 13 & n.34 (1960).

The thrust of petitioner's contention appears to be that, although the federal Constitution does not apply the Seventh Amendment to the States, petitioner is nevertheless entitled to application of that Amendment by virtue of federal treaty and acts of Congress. Petitioner would have this Court believe that the State of Louisiana has

wrongfully deprived its citizens of the benefits of certain "promises" contained in those federal enactments to the Seventh Amendment trial by jury.

Respondent submits that invocation of federal law in this respect is entirely misplaced, first because the citizens of Louisiana are themselves responsible for formulating the laws of the State and, second, because the State of Louisiana has fully complied with applicable federal law.

The citizens of Louisiana have exactly the judicial system they want; if they did not, appropriate avenues of redress have always been available to them. As Chief Justice Marshall observed long ago in *Barron*, wherein petitioner sought to invoke the federal Constitution against state legislative action:

> Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself.

32 U.S. at 249-150.

The citizens of Louisiana have expressed no desire to be hidebound by the proscriptions of the Seventh Amendment, but are content with a judicial system which has operated smoothly and successfully for over 100 years. Indeed, at the constitutional convention in 1973, an attempt to rescind the authority of appellate courts to review factual findings was soundly defeated. *Gonzales v. Xerox Corp.*, 320 So.2d 163, n.1 (La. 1975).

In any event, the State of Louisiana has comported fully with the relevant federal treaty and acts of Congress upon which petitioner so heavily relies.

II. BECAUSE APPELLATE REVIEW OF FACT UNDER THE LOUISIANA STATE CONSTITUTION IS NOT INCONSISTENT WITH THE UNITED STATES CONSTITUTION, IT DOES NOT VIOLATE ANY TREATIES OR ACTS OF CONGRESS BY WHICH LOUISIANA WAS ADMITTED TO THE UNION

While acknowledging that the right to a civil jury trial is not a fundamental right mandated in state courts by the United States Constitution, petitioner argues before this Court that Louisiana state courts are uniquely bound above all other states to provide that right for all civil litigants. In support of this proposition, petitioner cites the Treaty of Cession whereby Louisiana became part of the territory of the United States, and subsequent Acts of Congress pursuant to which Louisiana was admitted as a state to the Union. This argument is flawed because these documents only required Louisiana to adopt a state constitution which was "not inconsistent" with the federal Constitution. Petitioner's tautology collapses because if the federal Constitution does not grant civil trial by jury in state courts, *a fortiori*, the provision in the Louisiana constitution for appellate review of fact in state courts is certainly consistent with the federal Constitution. Although designed to circumvent an intrinsic constitutional deficiency, petitioner's argument fails to raise any new issues not previously decided by this Court because it turns, fundamentally, on a purely constitutional analysis.

The Treaty of Cession of Louisiana between the Republic of France and the United States of America was signed on April 30, 1803, and ratified on October 21, 1803. The Treaty was originally drafted in French, and was executed in both English and French. Article III of the Treaty stated:

> ARTICLE III.
>
> Les habitants des territoires cédés seront incorporés dans l'union des Etats-Unis, et admis, aussitot qu'il

> sera possible, d'aprés les principes de la constitution fédérale á la jouissance de tous les droits, avantages et immunités des citoyens des Etats-Unis, et en attendant, ils seront maintenues et protégés dans le jouissance de leurs libertés, proprietés, et dans l'exercice des religions qu'ils professent.[1]

In creatively recasting the previously rejected contention that Louisiana state courts are constitutionally bound to provide civil trial by jury without appellate review of fact, petitioner argues that Louisiana's constitutional scheme violates Article III of the Treaty of Cession. On its face, however, Article III merely establishes that the federal government was to place citizens of the ceded territory on "equal footing" with all other citizens of the United States of America. A reading of the Treaty of Cession 186 years after its ratification to mean that its provisions bound the not-yet-admitted State of Louisiana to guarantee forever the right to a traditional common law jury trial in state civil proceedings is tantamount to placing Louisiana's inhabitants on an altogether different, rather than equal, footing with the citizens of other states. The Bill of Rights guaranteed United States citizens civil jury trial only in the nation's federal courts, and this Court confirmed in pre-Fourteenth Amendment cases that the right was not constitutionally imposed upon the courts of the several states. The subsequent enactment of the Fourteenth Amendment and the evolution of due process requirements provided a clear opportunity for this Court to hold the Seventh Amendment applicable to state courts, but it has consistently refused to do so.

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[1] The English version of the Article reads as follows: "The inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (Petitioner's App. at 27a).

Petitioner has cited decisions of this Court discussing the common law prohibition against appellate re-examination of factfindings by a jury under the Seventh Amendment. Petition at 14-15. These cases are simply inapposite in the context of civil proceedings in Louisiana state courts. In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1912), this Court defined the question before it as "the power of a Federal court to re-examine, otherwise than according to the rules of the common law, issues of fact which have been determined by the verdict of a jury . . ." 228 U.S. at 395. The right of a state to modify civil trial by jury in its courts by allowing appellate review of fact was not considered, or in doubt, in *Slocum* given this Court's earlier holding in *Walker v. Sauvinet*, *supra*, that the Seventh Amendment is not binding on state courts.

Petitioner's argument faces an additional hurdle in that, although the treaty making power of the President and Senate under Article II of the Constitution extends to all proper subjects of negotiation, it does not include any matters which "do not essentially affect the actions of nations in relation to international affairs, but are purely internal." Hearings on S. J. Res. 1, before a subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 183 (1955) (Testimony of Secretary of State Dulles.), cited in Nowak, Rotunda & Young, *Constitutional Law* at 37 (3d ed. 1986). *See also*, *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890). This inherent limitation on the federal government's treaty making power undercuts petitioner's logic in hindsight. The Cession Treaty was never intended by the governments of France and the United States as the specific mandate concerning Louisiana's judicial and constitutional scheme that petitioner would presently have the Court believe.

Throughout its history, the State of Louisiana has enacted constitutions which are consistent with the federal

Constitution, and has ensured that all of its citizens enjoy the "rights, advantages and immunities" accorded to all citizens of the United States. The Governments of the United States and the State of Louisiana have fully complied with the 1803 Treaty of Cession, and petitioner's strained interpretation of this Article as a basis for invalidating Louisiana's scheme of appellate review and over 100 years of jurisprudence is misguided.

Subsequent legislative history pertaining to Louisiana's admission into the Union further confirms the limited and specific nature of the protections established by Congress on behalf of the citizens of Louisiana, and Louisiana's full compliance with the relevant statutes. Following the Treaty of 1803, the Province of Louisiana was divided into two territories, including the territory of Orleans, which ultimately became the State of Louisiana as admitted in 1812. Once the governmental infrastructure of the territory of Orleans was established, Congress passed the "Enabling Act", Act of Congress, February 20, 1811, which was entitled as follows:

> Chap. XXI—An Act to enable the people of the territory of Orleans to form a constitutional state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes.

Respondent's App. at 1a.

Although Congress was committed to granting Louisiana's admittance on "equal footing" with the other states, the Enabling Act further directed that Louisiana's citizens "are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper, under the provisions upon the conditions hereinafter mentioned."

Petitioner has noted that certain parameters were established for the constitution to be formed by the citizens of the Louisiana territory prior to statehood. Although

petitioner's brief before the Louisiana Supreme Court quoted the full pertinent provision, its brief before this Court omits a key phrase from this portion of the statute:

> Provided, the constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the Constitution of the United States; *that it shall contain the fundamental principles of civil and religious liberty; that it shall secure the citizen a trial by jury in all criminal cases, and the privilege of the writ of habeas corpus conformably to the provisions of the Constitution of the United States* . . . (Emphasis added.) (Respondent's App. at 1a).

When read in context, it is clear that these legislative requirements for Louisiana's admission parallel those of the 1803 Treaty of Cession. Louisiana's citizens were to be placed on "equal footing" and enjoy constitutionally guaranteed rights in the same manner as they were enjoyed by all other citizens of the nation. There is no basis whatsoever to expand that congressional mandate to encompass rights which other citizens of the nation did not enjoy, including a completely unfettered right to a civil jury trial in state court.

This Act of Congress pursuant to which Louisiana became one of the United States of America focused on religious and civil liberties essential to a democracy, and specifically required strict conformity with the federal Constitution only with respect to the guarantee of trial by jury in criminal cases. The limitation of the Enabling Act's reference to criminal trial by jury fatally pierces petitioner's argument that subsequent Louisiana constitutional enactments violated the supreme law of the nation.[2] The Enabling Act provided a framework for

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[2] In petitioner's brief, reference is made to Acts of Congress prior to the Enabling Act concerning the judicial system which was established on an interim basis between the Treaty of 1803 and the Enabling Act. The more explicit requirements of the Enabling

Louisiana to gain admission as a state, and for protecting certain fundamental rights and liberties enjoyed by all other United States citizens. The Act should not be read as imposing a specific limitation on the State of Louisiana's right to establish a judicial system of its own design which fully comported with the federal Constitution.

Pursuant to the Enabling Act, a Louisiana constitutional convention was called and the Louisiana Constitution of 1812 resulted. Article IV of the 1812 constitution spoke to the creation of a state court judicial system, and included no specific provisions with respect to appellate review of fact in civil cases by the Supreme Court, which was the only appellate court at that time. Respondent's App. at 1a. Article IV did include, however, a critical section designed to preserve Louisiana's civil law tradition intact unless or until the legislature altered a rule of law on a specific issue-by-issue basis:

> The existing laws in this territory, when this constitution goes into effect, shall continue to be enforced until altered or abolished by the Legislature; Provided however, that the Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.
>
> Article IV, Section 11 of the Louisiana Constitution of 1812.

The State of Louisiana did adopt the common law criminal system, including the right to trial by jury in criminal prosecutions, in Article VI, Section 18 of the Constitution of 1812, in accordance with the express directive of the Enabling Act.

Act as the basis for Louisiana's admission as a state represent the latest expression of the sovereign will, and therefore control. *See, Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

Thus, although trial by jury in civil cases was adopted in the Practice Act of 1805 by the first session of the legislative council of the Territory of Orleans, the Louisiana Constitution of 1812 did not mandate civil trial by jury, and expressly preserved Louisiana's civil law practices and procedures which traditionally included appellate review of fact. As noted in petitioner's brief, by Act of Congress dated April 8, 1812, Congress approved the Louisiana Constitution of 1812 and incorporated Louisiana in the Union on the basis of that approval. Congress approved the Constitution of 1812 for one simple reason: it fully complied with the mandate previously set forth in the Enabling Act in that it was "not inconsistent" with the terms of the United States Constitution.

Petitioner implies that Congress approved the Constitution of 1812 unaware of an alleged inconsistency because there was no specific reference in that document to appellate review of fact. In fact, Congressional approval of the 1812 constitution and Louisiana's subsequent admission indicates that, although the 1812 Constitution clearly did not guarantee civil trial by jury in terms similar to the Seventh Amendment to the federal Constitution, or certain other provisions incorporated in the Bill of Rights, Congress nonetheless approved the Louisiana constitution because it was not inconsistent with the United States Constitution. Congress was well aware that Louisiana's juridical roots lay in the civil law of continental Europe, and that the 1812 constitution preserved certain legal principles and practices which were different from the common law practiced by the other states. In sum, the Congressional mandate set forth in the Enabling Act was fully complied with, and Congress verified that fact prior to admitting Louisiana as a state in 1812.

Early decisions by this Court similarly recognized that Louisiana's civil law practices and procedures were distinctly different from the common law practice in other

states of the nation. These cases arose as a result of congressional legislation in 1824 which provided that Louisiana federal courts would be governed by state law procedure, with federal district court judges being granted limited authority to modify those procedures to accommodate discrepancies with common law practice. In *Parsons v. Bedford*, 28 U.S. 433 (1830), the Court held that, notwithstanding the Act of Congress of May 26, 1824, Louisiana federal courts were constitutionally prohibited from granting a new trial to reconsider a jury's findings of fact. Subsequently, in *Livingston v. Story*, 34 U.S. (9 Pet.) 632 (1835), the Court held that Louisiana federal courts exercise equity jurisdiction in accordance with other United States courts pursuant to Article III of the U.S. Constitution, even though the distinction between actions at law and equity was unknown in Louisiana state court procedure. Although these decisions mainly clarify the limited role that Louisiana civil law procedure would play in federal courts within the state, they also highlight this Court's awareness, and that of Congress, that Louisiana was free to practice and adhere to civilian procedure in state court actions.

Early decisions of the Louisiana Supreme Court confirmed that appellate courts could review the evidence considered at the trial court level, and modify or reverse a civil jury's verdict. *Abat v. Doliole*, 4 Mart. (O.S.) 136 (1816). Although under the terms of the Code of Practice of 1805, as well as all subsequent versions of the code, the right to a jury trial was absolute on the timely request of either party to the action, the right was judically and legislatively modified to encompass appellate review of fact in accordance with traditional civil law procedure.[3] As noted by Judge John Minor Wisdom on

[3] Concerning the scope of appellate review, Article 2164 of the Louisiana Code of Civil Procedure currently provides:

> The Appellate Court shall render any judgment which is just, legal, and proper upon the record on appeal.

behalf of the three-judge panel in *Melancon v. McKeithen*, 345 F.Supp. 1025, (E.D. La. 1972), *aff'd* 409 U.S. 943 and 1098 (1972), the civil law in Louisiana has always fused the concepts of "equity" and "common law" as they are recognized in Anglo-American jurisdictions. To that extent, prohibition of appellate review of the facts would tend to destroy this fusion. Because the state never had common law courts as distinguished from other courts, the federal Constitution's reference in the Seventh Amendment to "suits at common law", construed as the framers construed it, is meaningless in the Louisiana judicial system. *Melancon*, 345 F.Supp. at 1029.

Appellate review of fact in Louisiana was repeatedly confirmed by the Louisiana Supreme Court from 1820 onward,[4] and was impliedly confirmed in subsequent constitutions. H. McMahon, *The Louisiana Code of Civil Procedure*, 21 La. L. Rev. 1, 13 n.34 (1960). The Louisiana Constitution of 1845 provided for Supreme Court review "in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding $300.00 is actually imposed." Louisiana Constitution of 1845, Article 63. Respondent's App. at 2a. Similarly, the constitutions of 1852 and 1864 provided that, although the Supreme Court's appellate jurisdiction in criminal matters was limited to legal questions, that was impliedly not the case in civil actions. Respondent's App. at 2a-3a.

The Constitution of 1879 explicitly stated that "appeal on the law and the fact" was directly from the court in

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[4] *See Martineau v. Hooper*, 8 Mart. (O.S.) 699 (1820); *Mitchel v. Jewel*, 10 Mart. (O.S.) 645 (1822); *Morris v. Hatch*, 2 Mart. (N.S.) 491 (1824). *See also Scott v. Turnbull*, 10 Mart. (O.S.) 335 (1821); *Dunn & Wife v. Duncan's Heirs*, 10 Mart. (O.S.) 671 (1822); *LaPointe v. Guidry*, 7 La. 246 (1834); *Montgomery v. Russell*, 10 La. 330 (1836); *Williams v. Lanier*, 14 La. 210 (1839); *Hood v. McCorkle*, 16 La. 240 (1840); *Nott & Co. v. Kirkman*, 19 La. 14 (1841).

which the case originated to the Supreme Court, the only appellate court at that time, and "in criminal cases, on questions of law alone." Respondent's App. at 3a. Subsequent Louisiana constitutions established the state appellate court structure, and expressly provided for review of law and fact in civil cases, for both the Supreme Court and courts of appeal. *See* Louisiana Constitution of 1898, Arts. 85, 98 [As amended Acts 1906, No. 137, adopted Nov. 6, 1906] Respondent's App. at 3a; Louisiana Constitution of 1913, Arts. 85, 98 Respondent's App. at 4a; Louisiana Constitution of 1921, Art. VII, §§ 10, 29 Respondent's App. at 4a; Louisiana Constitution of 1974, Art. 5, §§ 5(e), 10(B). Respondent's App. at 5a. Moreover, Louisiana's constitutional protection of this cornerstone of civil law procedure in state courts reflects the will of a majority of Louisiana's citizens. An initiative during the state's 1974 constitutional convention to rescind the authority of appellate courts to review factual findings failed. Transcript of Constitutional Convention, Vol. IX, 30th Day, pp. 61-73), cited in *Gonzales v. Xerox Corp., supra.*

The scheme of appellate review of law and fact in Louisiana embodies a procedural compromise which has evolved, legislatively and judicially, to accommodate Louisiana's civil law traditions and Anglo-American concepts of due process. *Melancon*, 345 F.Supp. at 1047. Contrary to petitioner's argument that appellate review of fact in Louisiana state courts renders civil trial by jury in Louisiana a "futile exercise", the process has simply been modified to balance principles of justice and legitimate concerns about judicial economy and efficiency. Although petitioner might disagree with the system as it works in this case, as long as the State of Louisiana has effected civil procedures which are consistent with the federal Constitution, the relevant inquiry is answered. Appellate review of fact is the majority's mandate to alter traditional civil trial by jury as it is known under

the common law, and is neither unconstitutional nor unlawful.

Petitioner's portrayal of Louisiana as a state that has violated the terms by which it was admitted to the Union is really a veiled attempt to overturn the right of its citizens to provide for meaningful trial by jury as they see fit. Petitioner's brief suggests that this case presents an opportunity for the Court to secure what citizens of the state of Louisiana "have been seeking unsuccessfully to secure" ever since its admittance into the Union. The truth is that Louisiana's citizens have received everything they are entitled to, and more, including a sensible mechanism for ensuring fair and efficient civil jury trials in accordance with the civil law procedures which they have enacted for themselves.

Judge Wisdom's thoughtful analysis in *Melancon* correctly points out that Louisiana is not the only jurisdiction to modify civil trial by jury as it existed when the Bill of Rights was enacted. Many states no longer require a civil jury to be unanimous in its verdict, and the majority of states have legislatively authorized civil juries of less than the traditional 12 jurors in the common law. 345 F.Supp. at 1042. Even in federal courts where the Seventh Amendment is applicable, parties may stipulate to a reduced jury, or may even waive the right to a jury trial. *See* Rules 38 and 48, Fed. R. Civ. P. Even in criminal cases where the right to a jury trial is constitutionally guaranteed in state courts, *see Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court has nonetheless approved juries of less than twelve. *Williams v. State of Florida*, 399 U.S. 78 (1970). Certain crimes, collectively referred to as "petty" offenses, do not require jury trial at all despite this Court's holding that a jury trial in criminal cases is required by due process. The significance of these modifications in jury trials was summarized by Judge Wisdom as follows:

> These examples from the criminal area demonstrate that a right considered 'fundamental' may be modified or abolished altogether. Even if we were to decide that the right to a jury trial in civil cases is a requirement of due process, the Louisiana modification of that alleged right would not necessarily be constitutionally impermissible. The Louisiana statutes challenged here cannot be considered 'unreasonable or arbitrary', in the light of the historical origin and line of development of the cases involving the right to a jury. *Hardware Dealers Mutual Fire Ins. Co. of Wisconsin v. Glidden Company,* 284 U.S. 151 (1931).
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> 345 F.Supp. at 1043-44.

The decision of the three judge panel for which Judge Wisdom was speaking went on to expressly hold that, even assuming a civil jury trial in state court was constitutionally required, the Louisiana scheme does not destroy that right, "but modifies it in accordance with fair procedures many of which are analogous to procedures established in the Federal Rules of Civil Procedure." 345 F.Supp. at 1045. That reasoning is as true today as it was at the time of the *Melancon* decision. Although petitioner urges that the appellate court's reversal of the jury's verdict in this case demonstrates a complete disintegration of that right in Louisiana, the relevant inquiry of whether the system as a whole is lawful, constitutional, and indeed fundamentally fair, must be answered in the affirmative.[5]

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[5] The evolution of trial by jury in jurisdictions other than Louisiana raises an important practical question concerning the scope of petitioner's argument. If, as petitioner alleges, appellate review of fact in Louisiana abrogates the right to a civil trial by jury as required by federal treaty and legislation, petitioner's argument implies that Louisiana must preserve that right as it existed in common law jurisdictions when Louisiana was admitted to the Union. Theoretically, Louisiana would be uniquely unable to modify its procedures in accordance with the changes in civil jury trials enacted by other jurisdictions. It is unclear under petitioner's logic,

III. THE COURT OF APPEALS' DECISION TO REVERSE THE JURY VERDICT IN THIS CASE WAS IN ACCORDANCE WITH LOUISIANA STATE LAW GUIDELINES CONCERNING APPELLATE REVIEW OF FACT

Petitioner further urges that the appellate court ran roughshod over the checks and balances judicially imposed on the power of a Louisiana appeals court to review a trial court's findings of fact, particularly the "manifest error" doctrine. Although Louisiana is not bound by the federal Constitution, treaty or statute to provide civil jury trials in state courts, petitioner argues that the judicially self-created constraints imposed upon Louisiana appellate courts were effectively ignored in this case because the appeals court saw fit to reverse and render a judgment based upon the factual record before it. This argument, asserted as the second question presented to this Court and as petitioner's fourth assignment of error to the Supreme Court of Louisiana, raises purely state law issues which were correctly passed upon by that tribunal, and is simply without foundation.

Closely interwoven with the "manifest error" limitation upon appellate fact review in Louisiana is the principal that an appeals court should verify that a jury's verdict was based upon correct application of the law to the facts. Jury instructions which are fundamentally incorrect or insufficiently clear with respect to a crucial issue directly effect whether individual justice has resulted in a particular case, because a jury's verdict must reflect correct application of general rules of law to the particular facts at issue. The Louisiana jurisprudence

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whether Louisiana would be required to provide juries composed of 12 jurors in civil cases and subject to a requirement of unanimous verdict. Although petitioner paints the scheme of appellate review in Louisiana as an aberrational threat to civil jury trials, petitioner's argument, when taken to its logical extreme, would require Louisiana to stand uniquely frozen in time, contrary even to the common law jurisdictions in this nation and England.

has correctly established that when jury instructions are fundamentally lacking or incorrect, an appellate court with a complete record before it should review the facts and render a decision. *Gonzales v. Xerox Corp.*, 320 So.2d 163 (La. 1975).

Because the Louisiana Constitution and the Civil Code expressly extend appellate court jurisdiction in civil cases to fact and law, Louisiana courts are properly empowered to review, and if necessary to reverse, findings of fact previously considered against the backdrop of incorrect or inadequate jury instructions. As the Court of Appeals in this case noted, "adequate jury instructions are those that fairly and reasonably point out the issues and provide correct principles of law for the jury to apply to those issues." (Citation omitted). Petitioner's App. at 8a. Thus, although the adequacy of jury instructions is conceptually distinct from the "manifest error" analysis of a Louisiana appeals court, these doctrines are interrelated and have evolved to accommodate the sanctity of the findings at the trial court level, fairness principles and judicial economy.

Although the Louisiana Court of Appeals found that the jury instructions in this case were inadequate because they did not clearly point out the issues and provide correct principles of law for the jury to apply, the court's reversal of the jury verdict was also expressly based upon the "manifest error" standard. After conducting its *de novo* review of the evidence, the court explicitly noted that the "manifest error" threshold had been crossed in this case:

> Given the overwhelming nature of the evidence even under the standard of manifest error, we would be constrained to hold the verdict plainly wrong. And given the inadequacy of the jury instructions, we conclude *a fortiori* that the evidence preponderated to show that Doug Fuller was an employee of Joe Bob White.

Petitioner's App. at 25a.

The jury instruction which the Louisiana Court of Appeals found to be inadequate went to the most crucial distinction in this case between employee and independent contractor status. The appellate court correctly held that the legal framework against which the jury viewed the evidence was impermissibly unclear and incorrect, and given that fact and the overwhelming evidence against the verdict, that the jury's findings of fact on that point were manifestly erroneous. Credibility of testimony requiring firsthand view of witnesses was not at issue, and the Louisiana Court of Appeals' decision was fully supported by a complete record. The Louisiana Supreme Court was satisfied that the Court of Appeals' decision in these circumstances was a completely proper exercise of an appellate court's constitutional and legislative authority under Louisiana law, and the decision by the Louisiana Court of Appeals raises no questions to which a writ from this Court should be directed.

CONCLUSION

Petitioner has failed to articulate any cognizable basis for invalidating Louisiana's constitutional scheme of appellate review of law and fact, and over one hundred years of jurisprudence decided in accordance with that scheme. This Court has consistently upheld the right of Louisiana citizens to preserve their civil law traditions and practices in state court proceedings. The Louisiana constitution, both in its earliest and present forms, is fully consistent with the federal Constitution, and therefore comports with all United States treaties and Acts of Congress by which Louisiana gained statehood.

Because petitioner's application merely reconstructs arguments previously rejected by this Honorable Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ACTS OF CONGRESS AUTHORIZING ADMISSION OF STATE OF LOUISIANA

Enabling Act,
Act of Congress, February 20, 1811

Chap. XXI—An Act to enable the people of the territory of Orleans to form a constitutional state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes.

* * * *

Provided, the constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the Constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; that it shall secure the citizen a trial by jury in all criminal cases, and the privilege of the writ of habeas corpus conformably to the provisions of the Constitution of the United States . . .

CONSTITUTIONS OF THE STATE OF LOUISIANA

Constitution of 1812

Article IV

CONCERNING THE JUDICIARY DEPARTMENT

§ 11. The existing laws in this territory, when this constituion goes into effect, shall continue to be enforced until altered or abolished by the Legislature; provided however, that the Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.

Article VI

§ 11. In all criminal prosecutions, the accused has the right of being heard by himself or counsel, of demanding

the nature and cause of the accusation against him, of meeting the witnesses face to face, of having compulsory process for obtaining witnesses in his favor, and prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, nor shall he be compelled to give evidence against himself.

Constitution of 1845

Art. 63. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction, which jurisdiction shall extend to all cases where the matter in dispute shall exceed $300.00 . . . and in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding $300.00 is actually imposed.

Constitution of 1852

TITLE V

JUDICIARY DEPARTMENT

Art. 62. The Supreme Court, except in cases hereinafter provided, shall appellate jurisdiction only . . . and to all criminal cases on questions of law alone, . . . The legislature shall have power to restrict the jurisdiction of the Supreme Court in civil cases to questions of law only.

Constitution of 1864

TITLE V

JUDICIARY DEPARTMENT

Art. 70. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and to all criminal cases on questions of law alone. . . .

Constitution of 1868

TITLE IV

JUDICIARY DEPARTMENT

Art. 74. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and in such cases the appeal shall be direct from the court in which the case originated to the Supreme Court; and in criminal cases, on questions of law only. . . .

Constitution of 1879

JUDICIARY DEPARTMENT

Art. 81. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases when the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed $2,000.00, exclusive of interest . . . and in such cases the appeal on the law and the fact shall be directly from the court in which the case originated to the Supreme Court; and to criminal cases, on questions of law only. . . .

Constitution of 1898

Art. 85. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and in such cases the appeal on the law and the fact shall be directly from the court in which the case originated to the Supreme Court; and to criminal cases, on questions of law alone. . . .

Art. 98. [As amended Acts 1906, No. 137, adopted Nov. 6, 1906]. The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, when the matter in dispute of the fund to be distributed shall exceed one hundred dollars, exclusive of interest, and shall not exceed two thousand dol-

lars, exclusive of interest, and such appeal shall be upon the law and the facts.

Constitution of 1913

Art. 85. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and in such cases the appeal on the law and the fact shall be directly from the court in which the cases originated to the Supreme Court; and to criminal cases, on questions of law only . . . .

Art. 98. The Courts of Appeals, except as otherwise provided in this Constitution, shall have appellate jurisdiction only . . . and all appeals shall be both upon the law and the facts.

Constitution of 1921

JURISDICTION

§ 10. Supervisory, Original and Appellate Jurisdiction

§ 10. The Supreme Court has control of, and general supervisory jurisdiction over all inferior courts.

* * * *

In civil cases, its appellate jurisdiction extends to both the law and the facts. In criminal matters, its appellate jurisdiction extends to questions of law only.

§ 29. Appellate and Supervisory Jurisdiction

* * * *

All appeals of which the Courts of Appeal have appellate jurisdiction as provided in this section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other section of this Constitution.

Constitution of 1974

§ 5. Supreme Court; Jurisdiction; Rule-Making Power; Assignment of Judges

See (Scope of Review). Except as otherwise provided by this Constitution, the jurisdiction of the Supreme Court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law.

§ 10. Courts of Appeal; Jurisdiction

§ 10. The scope of review, except as limited to questions of law by this Constitution, or is provided by law on the review of administrative agency determination, appellate jurisdiction of a court of appeal extends to law and facts.

Louisiana Civil Code

Art. 2164. The Appellate Court shall render any judgment which is just, legal, and proper upon the record on appeal.

CONSTITUTION OF THE UNITED STATES

Art. II; § 2. Powers of the President

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . .